**STATE OF NEW JERSEY**
**DEPARTMENT OF LAW & PUBLIC SAFETY**
**DIVISION ON CIVIL RIGHTS**
**DCR DOCKET NO. EM05HG65739**

[redacted] )
)
**Complainant,** )
)
**v.** )
)
**Department of Military and** )
**Veteran's Affairs, New Jersey** )
**Veterans Memorial Home at** )
**Menlo Park,** )

**Respondent.**

**Administrative Action**
**FINDING OF PROBABLE CAUSE**

On January 11, 2016, [redacted] (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that Department of Military and Veteran's Affairs, New Jersey Veterans Memorial Home at Menlo Park (Respondent), discriminated against her based on disability, and failed to accommodate her disability in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination in their entirety. DCR's investigation found as follows.

## SUMMARY OF INVESTIGATION

Respondent is a long-term care nursing home in Edison. In May 2014, Respondent hired Complainant as a per diem Licensed Practical Nurse (LPN). Complainant was responsible for the residents' treatment including medication distribution, wound care, and treatment care. Respondent discharged Complainant, via letter dated October 5, 2015.

In the verified complaint, Complaint alleged that she had cancer, a disability as defined by the NJLAD, and commenced a medical leave for treatment on June 21, 2015. Complainant also alleged that she provided [redacted] with doctors' notes stating her disability and return to work date. On September 1, 2015, [redacted] contacted Complainant for a return to work date, and she informed [redacted] that she was undergoing chemotherapy and unable to return before the end of September 2015. Complainant attempted to return to work on October 9, 2015, but was removed or not added to the work schedule and was verbally advised of her termination. [1] Complainant alleged Respondent's Assistant Director of Nursing (ADON) Dora Boyton told her she was discharged for being absent from work for too long and that her services were no longer needed.

[1] Complainant alleged that she did not receive the October 5th letter until after her October 9th attempt to return to work.

In its response to the complaint, Respondent denied that Complainant's disability played any part in its decision. It asserted that Complainant was not eligible for FMLA leave because in 2014, as a per diem LPN, she worked 367.4 hours. In 2015, she worked 606.7 hours, for a combined 974.1 hours. Respondent's Position Statement admitted that on September 1, 2015, [redacted] called Complainant to discuss her return to work and was told that Complainant was unable to return before the end of September because she was undergoing chemotherapy. On September 29, 2015, ADON Boyton recommended Complainant be terminated because she had not worked since June 21, 2015 and was ineligible for FMLA leave. Respondent's Human Resources Manager Dawn Graeme sent Complainant a termination letter dated October 5, 2015, indicating Complainant's services were no longer needed.

In an interview with DCR, Complainant said that [redacted] scheduled her to return to work in the beginning of October 2015, but when she arrived, a shift supervisor told her she was not on the schedule and that she might be terminated. Complainant said she spoke to Boyton, who told her she had been gone for too long and there was nothing she could do. Complainant stated she asked if she could reapply since Respondent always needed employees, but Boyton told her she could not.

DCR reviewed two emails between [redacted] and Complainant, dated September 29 and 30, 2015. In the September 29, 2015 email, Complainant stated she was available October 6, 8, 9, 10, 14 and 19th. On September 30, 2015, [redacted] informed Complainant she was scheduled to return to work on October 9, 2015 from 11am to 7pm. [redacted] further stated that she would notify Complainant if there was availability on other days and asked Complainant if she was available to work either Thanksgiving, Christmas, or New Year's Days.

DCR also reviewed multiple medical notes provided by Complainant showing her disability and release to work date of October 5, 2015. In DCR's intake documentation, Complainant wrote that she asked [redacted] to take her off the schedule temporarily due to her disability so that she did not have to continue to call out.

DCR interviewed [redacted], who recalled receiving some doctors' notes from Complainant in or around June 2015. [redacted] did not recall details about Complainant's disability or the length of her medical request but noted that all doctors' notes went to Human Resources or the Employee Health file. [redacted] was in charge of scheduling the per-diem LPNs but left on her own medical leave from July 2015 to July 2016. Due to her leave she had no additional knowledge about Complainant.

DCR interviewed Human Resources Manager Dawn Graeme, who described a per-diem LPN as an at-will employee who fills in for employees who call out sick or go on vacation. They have no set schedules and their hours are not guaranteed. Graeme also told DCR that as a per-diem LPN, Complainant would have never been able to accumulate the hours needed to qualify for FMLA. She said that in Boyton's termination release for Complainant, Boyton noted that it was due to non-availability, which Graeme said would normally mean the employee was not available to work. Graeme told DCR she did not recall Complainant's disability or seeing any medical documentation in her personnel file. Graeme said that they have about 50 per-diem LPNs and that they could not have a per-diem LPN out for a six-month period because it would take

away from a position they could fill; however, she said Complainant's absence did not create an undue hardship.

DCR contacted [redacted] and Boyton; both said they could not provide any information on this matter because they did not recall Complainant.

Information obtained during the investigation was shared with Complainant, and prior to the conclusion of the investigation, she was given an opportunity to submit additional information.

## ANALYSIS

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2(a). "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." N.J.A.C. 13:4-10.2(b). If DCR determines that probable cause exists, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). However, if DCR finds there is no probable cause, then that determination is deemed to be a final agency order subject to review by the Appellate Division of the Superior Court of New Jersey. N.J.A.C. 13:4-10.2(e); R. 2:2-3(a)(2).

A finding of probable cause is not an adjudication on the merits. Instead, it is merely an initial "culling-out process" in which the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

The LAD makes it unlawful to fire, refuse to hire, or otherwise discriminate in the "terms, conditions or privileges of employment" based on disability. N.J.S.A. 10:5-12(a). It also requires employers to make a "reasonable accommodation to the limitations of any employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business." See N.J.A.C. 13:13-2.5(b); Potente v. County of Hudson, 187 N.J. 103, 110 (2006) (noting that our courts have "uniformly held that the [LAD] . . . requires an employer to reasonably accommodate an employee's disability").

New Jersey law has set forth an interactive process, pursuant to which once an employee with a disability requests an accommodation, "it is the employer who must make the reasonable effort to determine the appropriate accommodation." Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 400 (App. Div. 2002). An employer will be deemed to have failed to participate in the interactive process if: (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Id. at 400; see also, Jones v. Aluminum Shapes, 339 N.J. Super. at 425 (App. Div. 2001)); N.J.A.C. 13:13-

2.5(a); cf. Victor v. State, 203 N.J. 383, 414 (2010) (noting "neither a specific request nor the use of any 'magic words' is needed in order for an employee to be entitled to an interactive process focused on creating or accessing an accommodation").

An accommodation is not required if an employer can demonstrate that it would impose an "undue hardship on its business." N.J.A.C. 13:13-2.5(b)(3). In determining whether an accommodation would constitute an undue hardship, factors to be considered include (a) the overall size of the employer's business with respect to the number of employees, number of types of facilities, and size of budget; (b) the type of the employer's operations, including the composition and structure of the employer's workforce; (c) the nature and cost of the accommodation needed; and (d) the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement. N.J.A.C. 13:13-2.5(b)(3). The burden of proving undue hardship is on the employer. N.J.A.C. 13:13-2.8; cf. Lasky v. Moorestown Twp., 425 N.J. Super. 530, 545 (App. Div. 2012), certif. denied, 212 N.J. 198 (2012) ("If a defendant's response to a reasonable accommodation claim is that that accommodation would be unduly burdensome or an undue hardship, this defense is considered an affirmative defense and the defendant assumes the burden of proof on this issue.").

Here, the investigation found sufficient evidence to support a reasonable suspicion that Respondent discriminated against Complaint based on her disability. In this case, Complainant, who had cancer, requested to be removed temporarily from the per-diem LPN schedule due to her disability in order to undergo treatment. Evidence showed that Respondent was aware of Complainant's condition and the parties maintained communication during her absence. On September 29, 2015, [redacted] scheduled Complainant to return to work on October 9, 2015. [redacted] even inquired as to Complainant's availability for holiday dates in the upcoming months, showing there was work available for Complainant.

Respondent alleges that it did not discriminate against Complainant or fail to accommodate her disability because she was not entitled to FMLA. Respondent's Position Statement stated that Complainant was discharged on October 5, 2015 because she was not entitled to FMLA, and Graeme asserted that as a per-diem employee she would never be able to accumulate the hours necessary to quality for this leave. However, even for employees who are not entitled to FMLA leave, a period of leave from work may be a reasonable accommodation for a disability, as long as it does not impose an undue hardship on Respondent's operations. Here, Respondent has not shown that allowing Complainant to return to work after a little over three months, would have imposed an "undue hardship" on its operations. See N.J.A.C. 13:13-2.5(b). Graeme herself stated Complainant's absence from June 21, 2015 to October 5, 2015 did not represent an undue hardship.

At this threshold stage in the process, there is sufficient basis to warrant "proceed[ing] to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56. Therefore, the Director finds probable cause to support Complainant's allegations of disability discrimination.

Date: October 18, 2019

Rachel Wainer Apter, Director
NJ Division on Civil Rights